United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

74-1204 B P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 74-1204

- -

COALITION FOR EDUCATION IN DISTRICT ONE, BERTRAM BECK, PEDRO CORDERO, FRANK SUAREZ, JANE TAM, ERIC SNYDER, LYLE BROWN, GEORGINA HOGGARD, HENRY RAMOS, RAMONA CALDERON, FELICITA CLAUDIO, AMELIA OPIO, GLORIA ORTIZ, BERNARDO RODRIGUEZ, DONATO VELEZ RIVERA, PETRA SANTIAGO, JUANITA RIVIERA, RAMON PELIER, et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF ELECTIONS OF CITY OF NEW YORK, GUMERSINDO MARTINEZ, ALICE SACHS, ELRICH A. EASTMAN, HERBERT J. FEUER, CHARLES AVARELLO, ELIZABETH CASSIDY, ANTHONY SADOWSKI, et al.,

Defendants-Appellants,

CAROLYN KOZLOWSKY,

Defendant-Appellant.

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PETITION FOR REHEARING EN BANC AND APPLICATION FOR STAY OF AN ELECTION

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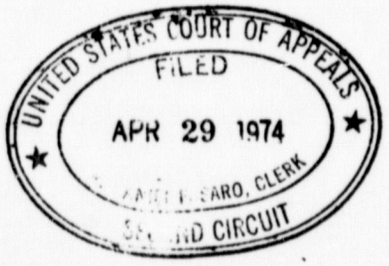

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -X

COALITION FOR EDUCATION IN DISTRICT ONE et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF ELECTIONS OF CITY OF NEW YORK et al., DOCKET NOS. 74-1204 74-1296

Defendants-Appellants,

CAROLYN KOZLOWSKY,

Defendant-Appellant

- -X

PETITION FOR REHEARING IN BANC
AND APPLICATION FOR STAY OF AN ELECTION

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT:

CAROLYN KOZLOWSKY, the defendant-appellant herein above named, respectfully petitions this Court for a rehearing in banc, and pending the determination for such relief, respectfully prays for an order staying the election for members of Community School Board District One now scheduled for May 14, 1974, and shows to this Court the following facts:

On April 24, 1974, this Court in a per curiam decision rendered by Judges Friendly and Timbers, Circuit

Judges, and Thomsen, District Judge unanimously affirmed an order of the District Court for the Southern District of New York, Charles E. Stewart Jr., Judge, which declared that a school board election held on May 1, 1973 for membership to Community School Board District One, New York, New York, was invalid because said election was conducted in a racially discriminatory manner, the positions of the persons elected at said election were vacant, directed a new election to be held on May 14, 1974, and provided that the Chancellor of the City School District of New York should exercise the powers of the previously elected school board pending the new election.

Your petitioner is one of the elected school board members who was removed from office.

POINT I

THE CIRCUIT COURT ERRED IN DISREGARDING THE RULE OF LAW ESTABLISHED BY BELL vs. SOUTHWELL, 376 F2d 659 (5th Cir, 1967), FOR THE QUANTUM OF RACIAL DISCRIMINATION NECESSARY TO BE FOUND TO VOID A COMPLETED ELECTION

The above case, and the innummerable cases following it, in the Fifth Circuit where most racial discrimination cases arise, was the leading authority cited by appellant in her brief and is in no manner referred to in this Court's opinion.

Bell announced that to set aside a completed election on the ground of racial discrimination, the

discrimination complained of must be "gross", "spectacular", "completely indefensible", "obvious", "state imposed" and "state enforced", and that "not every unconstitutional racial discrimination necessarily permits or requires a retrospective voiding of an election".

Each of the three judges joining in the per curiam opinion herein has stated that if he were sitting as a district judge he doubts whether he would have entered the orders appealed from, and cautions other district judges not to reach the same result on similar facts.

Such holding is pregnant with the admission by the per curiam court that the racial discrimination established in this action has not even reached the level of being substantial, to say nothing of reaching the level of gross, spectacular, completely indefensible, obvious, etc. ----- the level of discrimination required to set aside an election.

The question of whether the totality of the various facts and inferences therefrom add up to the level of racial discrimination required under Bell to set aside a completed election is one of law and the Court erred in failing to apply the law for by their own admission in their opinion the racial discrimination herein was minimal.

POINT II

THE CIRCUIT COURT ERRED IN NOT FINDING A "DEFINITE AND FIRM CONVICTION THAT A MISTAKE HAS BEEN COMMITTED BY THE DISTRICT COURT.

The per curiam opinion found that appellants have mounted a detailed challenge to the findings below concerning the discriminatory impact of the various irregularities and the effect of these on the election, and further found that many of these criticisms "appear to us to have substantial force".

The opinion further stated:

> "We have serious doubt whether, if any of us had been sitting as the district judge we would have entered the orders here under review, and we therefore do not wish our affirmance to be taken by district judges as any mandate to reach the same result on similar facts."

In spite of this overall view, the Circuit Court felt constrained to conclude that the "unless clearly erroneous" rule, F.R. Civ. P.52(a) was applicable herein as to the findings of fact and the inferences therefrom and that such findings by the District Court had to be accepted even though a controversy public in nature involving constitutional issues were before it for decision.

Although the basic facts found by the District Court were undisputed and were predicated upon both oral and written evidence, it was the legal conclusion reached

by the District Court that appellants challenged.

In Shapiro Bernstein & Co. v. Green, F. 2d 304, (2d Cir. 1963), Judge Kaufman, writing for this court, after stating that the scope of review on appeal is limited to determining if the lower court's conclusions are clearly erroneous, said:

> "...but where, as here, the facts are undisputed, and the issue of infringement depends merely upon a legal conclusion to be drawn from a consideration of the parties relationship, we feel that an appellates court's power of review need not be so constrained..." (pg. 307)

Thus, if in private litigation involving copyright infringement as in the aforecited case, the appellate court felt its power to review need not be constrained, it is submitted where, as in the instant case a public, constitutional problem is at issue, the appellate court, a fortiori, should not have been so constrained.

POINT III

THE CIRCUIT COURT HAD THE POWER TO REVIEW APPELLANT'S CONTENTION THAT THE ACTION WAS BARRED BY REASON OF APPELLEE'S LACK OF POST-ELECTION DILIGENCE AND ITS FAILURE TO CONSIDER SAME WAS ERROR.

The challenged election herein was held May 1, 1973. The action herein was commenced September 18, 1973. Appellant Kozlowsky in her brief urged that this approximate four-and-one-half (4 1/2) month delay in challenging a completed election barred the action. The Circuit Court

refused to pass upon appellant's contention on the ground that this issue was not presented below.

In Hormel v. Helvering, 312 U.S. 552 (1941), the Supreme Court held that in order to avoid a miscarriage of justice, an appellate court may consider questions of law neither pressed no passed upon at the trial. It then further said:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

POINT IV

UPON HOLDING THAT THE DISTRICT COURT, AFTER INVALIDATING THE ELECTION WOULD HAVE AFFORDED AMPLE RELIEF BY DIRECTING A NEW ELECTION TO FILL THE PLACES OF TWO OR THREE OF THE LOWEST SCORERS. THE CIRCUIT COURT ERRONEOUSLY FOUND IT LACKED THE AUTHORITY TO SHAPE AND FRAME THE RELIEF AND REFUSED TO DISTURB SAME.

The per curiam opinion states that the District Court decree invalidating the election of two or three lowest scorers and directing a new election to fill their places would seem to have afforded ample relief. [Note: The order affirmed herein set aside the election of all nine (9) school board memebers.] However, the per curiam

opinion held that the framing of a decree is the province of the District Court and would not be disturbed.

The Fifth Circuit in the voting rights cases heard by it in Toney v. White, 488 F2d 310 (5th Cir. en banc, 1973) and Smith v. Paris, 257 F.Supp. 901, mod and affd. 386 F2d 979 (5th Cir. 1967) as examples, found no lack of power or authority to disturb and change the relief granted by the District Court, in the one instance, by directing that the special election ordered by the District Court be eliminated and the order modified so that the ordered election be held at the time of regular elections; in the other instance, the Fifth Circuit, modified the District Court order granting no relief to one ordering an election but reduced the time of that elected office from four years to two years.

In the interest of justice, where civic minded community citizens undertake the thankless task of attempting to administer and direct the public school educational programs, without remuneration,should the Circuit Court, indicating in its opinion its realization that error was committed by the lower court, refuse to disturb relief granted below which the opinion by implication found to be excessive? The refusal of the Circuit Court to shape the relief so as to effect an equitable result renders an injustice to an innocent, well-intentioned citizen which cannot be rationalized.

The new election ordered to be held, as affirmed, is scheduled for May 14, 1974 and it is prayed that if this Court grant the within petition for a rehearing en banc that the holding of said election on said date be stayed.

Wherefore, for all of the reasons set forth above and in the papers previously submitted, your petitioner respectfully requests that this Court grant the petition for a rehearing en banc, that the orders of the District Court appealed from be upon further consideration by this Court sitting en banc, reversed.

Respectfully submitted

Joseph Frost

JOSEPH FROST
Attorney for Appellant
Kozlowsky etc.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well-founded and entitled to favorable consideration of the Court and that it is not filed for the purpose of delay.

Joseph Frost

JOSEPH FROST
Attorney for Appellant,
Kozlowsky

I hereby certify that I served the within Petition for rehearing En Banc upon

CHARLES E. WILLIAMS , III,Esq.
Attorney for Appellees
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ADRIAN P. BURKE
Corporation Counsel
Municipal Building
New York, N.Y. 10007

a true copy of by enclosing/said petition in a post paid envelope addressed to said attorneys and depositing same in an official depository under the exclusive custody of the United States Post office.

Joseph Frost
JOSEPH FROST